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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

JOE DEGNAN, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR FOR THE NINTH CIRCUIT and BRIEF IN SUPPORT OF PETITION

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Joe Degnan respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

This is a petition for a writ of certiorari to review and reverse a judgment of the United States Circuit Court of Appeals for the Ninth Circuit for error in affirming a decision of the United States Board of Tax Appeals (now The Tax Court of the United States).

On September 22, 1941, your petitioner filed with the United States Board of Tax Appeals his petition for a redetermination of a deficiency of petitioner's income tax for the taxable year 1939 (R. 3) as as-

sessed in the notice of deficiency mailed to petitioner by the Commissioner of Internal Revenue on June 26, 1941 (R. 8-12). The decision of the Tax Court of the United States sustaining the deficiency was entered November 2, 1942 (R. 31). A petition for review by the Circuit Court of Appeals for the Ninth Circuit was filed January 27, 1943 (R. 32-37). On June 29, 1943, that court rendered its opinion affirming The Tax Court of the United States and, upon the same day, its judgment was filed and entered (R. 57).

The deficiency in question resulted from the disallowance by the Commissioner of percentage depletion as claimed in the partnership return of a metal-mining partnership for the year 1939. His share of the income from the partnership was reported by petitioner in his individual return for 1939. Disallowance of this percentage depletion in the partnership return for the same year, raised the individual income of petitioner proportionately and produced the deficiency.

The basis for the disallowance by the Commissioner of the claimed percentage depletion was that income was first realized from the mining property in question during the year 1938 and that no election had been made in any *timely* return for that year to take percentage depletion and that under Section 114 (b) (4) of the Internal Revenue Code such percentage depletion could not be allowed in the absence of such election in a timely return for such year (R. 11).

Petitioner throughout this litigation has duly and consistently challenged the correctness of this interpretation of the statute both before the Board of Tax

Appeals (R. 4, 6) and before the Circuit Court of Appeals (R. 35).

The question involved is a pure question of law, concerned wholly with the meaning of the section of the statute. No issue of fact was before either of the lower tribunals, the matter having been submitted upon an agreed statement (R. 15-19) adopted by the Board of Tax Appeals (R. 23).

The metal mining partnership of which petitioner was a member duly filed its return for 1939 and therein by appropriate language claimed percentage depletion (R. 18, paragraph 8). Income had been first realized from the property during 1938 (R. 16, paragraph 3). No partnership return for 1938 was filed until September 18, 1940, at which time the return so filed contained appropriate language to elect to take percentage depletion (R. 17, paragraph 7).

The question is whether either of the said returns was a "first return" within the meaning of Section 114 (b) (4) which provides:

> "A taxpayer making his first return under this chapter * * * shall state whether he elects to have depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion * * *."[1]

Admittedly the section contains no reference to the time of filing the "first return" and contains no lan-

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[1]The complete text of the section is set forth in the Appendix following the Brief in support of this petition, *infra*, p. 1A.

guage restricting the election therein granted to a "timely" return. Yet The Board of Tax Appeals held that this was a requisite (R. 22) and the Circuit Court of Appeals affirmed (R. 57).

B.

Assignments of Error

1. The Circuit Court of Appeals erred in holding that the partnership return for 1939 was not a "first return" within the purview of the statute.

2. The Circuit Court of Appeals erred in holding that the partnership return for 1938 did not make an effective election entitling the taxpayer to the benefit of percentage depletion, because "not timely filed."

C.

Reasons Relied On for the Allowance of the Writ

1. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

It is manifest from both opinions below that the question here involved is one of first impression (R. 26, 50). That the construction of the section in question is important seems attested by the fact that this court has at least twice in recent years granted certiorari to pass upon its interpretation. *J. E. Riley Investment Co. v. Commissioner*, 311 U.S. 55; *Mother Lode Coalition Mines Co. v. Helvering*, 317 U.S. 222.

2. The decision, although one of first impression, is in conflict with *Ardbern Co. Ltd. v. Commissioner*, 120 F.(2d) 424, from the Fourth Circuit, and *Del*

Mar Addition v. Commissioner, 113 F.(2d) 410, from the Fifth Circuit, which hold, under analagous statutory provisions, that a return is to be given effect even though belated in filing.

3. The decision, we believe, misconceives the purport of the decisions of this court which it cites. It fails to recognize that in *Riley Investment Co. v. Commissioner*, 311 U.S. 55, and the other cases cited, this court was dealing with a problem essentially different from the instant one. In the *Riley* case, this court, we contend, set the limits upon the right to file amended, as distinguished from original, returns. The whole right to amend was non-statutory. *Haggar v. Helvering*, 308 U.S. 389. Setting the limits upon such a judicially accorded privilege is, we respectfully urge, a different problem than attempting, by judicial decision, to supply a time limit for action under a statute, wherefrom Congress, presumably advisedly, saw fit to omit such; and by decision, further, to add a cumulative, non-statutory penalty for tardiness in filing an original return, in addition to the penalties expressly set forth in the Revenue Code for belated filing. We urge, in this connection, that the decision fails to recognize the fundamental distinction between original and amended returns and fails to credit the writer of the opinion in the *Riley* case with accuracy in the use of language in the italicized portion of the following quotation:

> "Petitioner is seeking by this amendment not only to change the basis upon which its taxable income was computed for 1934 but to adopt a new method of computation for all subsequent years. That opportunity was afforded as a mat-

> ter of legislative grace; the election had to be made in the manner and in the time prescribed by Congress. The offer was liberal. But the method of its acceptance was restricted. *The offer permitted an election only in an original return or in a timely amendment.* An amendment for the purposes of §114 (b) (4) would be timely only if filed within the period provided by the statute for filing the original return. No other time limitation would have statutory sanction. To extend the time beyond the limits prescribed in the Act is a legislative not a judicial function." (311 U.S. 55, 59)

Also, we believe, the decision misses the injunction implicit in the last sentence of the quotation, that fixing time limits and penalties in addition to those in the Act, is not a proper judicial function.

Your petitioner presents herewith to this court, and files herewith as an exhibit hereto a duly certified transcript of the entire record in the case as the same appears in the United States Circuit Court of Appeals, together with your petitioner's brief in support of this petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case num-

bered and entitled on its docket, No. 10376, *Joe Degnan, Petitioner, v. Commissioner of Internal Revenue, Respondent*, and that the said judgment of the said Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

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Petitioner.

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